Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TRAFFORD DISTRIBUTION CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a finding of unlawful employer intent to avoid labor law obligations is essential to the imposition of alter ego status under the National Labor Relations Act.

Whether the determinations of the ALJ on the issue of employer intent, as affirmed by the Board and the Third Circuit, were unsupported by substantial evidence.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the United States Court of Appeals for the Third Circuit:

Trafford Distribution Center
Petitioner in No. 05-3765, Respondent in 05-4198

National Labor Relations Board
Respondent in 05-3765, Petitioner in 05-4198

Liberty Source W, LLC
Respondent in 05-4198

Petitioner Trafford Distribution Center has no parent company or publicly held company owning 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Trafford Distribution Center ("Trafford") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated February 26, 2007, is officially reported at 478 F.3d 172, unofficially reported at 181 LRRM (BNA) 2449, 154 Lab. Cas. ¶ 10,809, and reproduced at App. A, 1a-18a.

The decision and order of the National Labor Relations Board, dated July 22, 2005, and the decision of the Administrative Law Judge ("ALJ") are officially reported at 344 NLRB No. 137. They are also referenced at 177 LRRM (BNA) 1331, 2005 WL 1767248, and are reproduced at App. B, 19a-71a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on February 26, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are §§ 7, 8(a)(1), 8(a)5), 8(d) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§157, 158(a)(1), 158(a)(5), 158(d), 159(a) ("NLRA" or "Act"). The relevant statutory provisions are reproduced at App. C, 72a-86a.

STATEMENT OF THE CASE

This matter originated with a complaint issued on December 30, 2003 by the Director of Region 6 of the NLRB in response to charges filed by the Federation of Independent Salaried Unions ("Federation") and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO ("IUE") (collectively "Unions"). The complaint sought to bind Trafford to certain collective bargaining agreements in effect between the Unions and another company, Liberty Source W, LLC ("Liberty"), alleging that Trafford and Liberty should be treated as one entity under the alter ego doctrine. App. B, 33a.

Liberty, the former in-house printing operation of Westinghouse Corporation, was formed by Joseph Wortley in December, 1998. At one time, Liberty employed 120 people, had annual sales of more than $17 million, and was the second-largest printer in the Pittsburgh region. App. A, 3a.

Liberty's printing operation included high-quality media printing using heat-set presses and web presses that produced time-sensitive sales and marketing literature. Liberty's portfolio included work for the CBS television network, the alumni publication for Indiana University of Pennsylvania, and a catalog for Leeds, the New Kensington-based private label firm. The company also offered a broad range of "e-source," or digital, services, including web page design and CD-ROM production, as well as software development. To help bolster its internet business, Liberty had forged partnerships with Microsoft Corporation and Adobe Systems. App. A, 3a; App B, 37a.

Additionally, as a very small part of its overall business, the company operated a modest warehouse fulfillment operation, whereby customers, the largest of which was the Heinz Company, shipped materials to be held at Liberty's warehouse. As orders came in for the

customer's products, Liberty fulfilled the orders by completing the necessary packing, shipping, invoicing, and inventory control documentation. App. A, 3a; App B, 37a.

In 2003, Liberty's printing operation produced over eighty percent of the company's sales. The remainder of Liberty's business was generated by its e-source products and services and warehouse fulfillment services, with the warehouse fulfillment operation accounting for less than two percent of Liberty's total sales. App. B, 37a.

At its inception, approximately eighty-five of Liberty's employees worked on the printing side of the company. Roughly thirty people were employed by Liberty's e-source business. Only about six employees worked in the fulfillment operation. For its printing and e-source components, Liberty's employees included skilled craftsmen, artists, pressmen, refinishing workers, and customer service estimators. For its fulfillment operation, Liberty's employees included warehousemen and customer service representatives. App. B, 37a.

The employees of the in-house printing operation of Westinghouse Corporation had been represented by two Unions, Federation and IUE. When the company changed hands, Liberty entered into collective bargaining agreements with both of those Unions that essentially mirrored the contracts that they had had with Westinghouse. Liberty's salaried employees were represented by Federation; IUE represented the company's hourly workforce. App. A, 3a-4a.

Shortly after Liberty was created, New Jersey-based Independence Community Bank ("Bank") extended a loan to the new company in the principal amount of $1.5 million. Pursuant to the Revolving Loan and Security Agreement between Liberty and the Bank, the Bank's security interest in Liberty included all accounts receivable, all contracts, and all inventory and equipment. The Bank was Liberty's principal secured creditor. Throughout the years, the relationship between Liberty owner Joseph Wortley and the Bank deteriorated due to a

number of financial disagreements between the parties. App. A, 4a; App. B, 38a.

Beginning in 2002, Liberty experienced significant financial difficulties. The company was in debt to a number of suppliers, including some of Liberty's paper merchants. By 2003, Liberty had established continuing payment plans with several of these suppliers, with the goal to keep product flowing while processing its outstanding debts. Unfortunately, Liberty was unable to come to terms on payments plans with all of its suppliers. To make matters worse, Liberty needed to overhaul its commercial web press, at a cost of $1.25 million. App. B, 38a.

Liberty had obtained financing for the overhaul of the web press from Broad National Bank. However, in the midst of the financing process, Broad National was purchased by Independence Community Bank. Due to the already strained relationship between the Bank and Mr. Wortley, significant problems arose concerning the final financing terms. App. B, 38a.

Later, Liberty was unable to pay the required monthly installments of principal and interest due on its loans from the Bank, and the Bank filed a complaint in mortgage foreclosure seeking over $1.8 million in principal, interest, late charges, collection costs, and attorneys' fees from Liberty. Because it already had substantial financial difficulties, and was unable to obtain any further relief or credit from the Bank, on September 2, 2003, Liberty surrendered all of its assets, representing the collateral on its loan, to the Bank. When Liberty surrendered its assets to the Bank, the assets assumed by the Bank included the collective bargaining contracts in force between Liberty and the Unions. App. A, 4a.

On September 3, 2003, the managers of Liberty were notified by Liberty president Richard Carmody that the assets of the company had been surrendered, and that Liberty was to halt all operations, send employees home, and secure the premises and all equipment for the Bank. This turn of events took Liberty's managers by surprise

and created a somewhat chaotic situation. The managers discussed the situation, and agreed that employees should be notified immediately, and that to avoid any further confusion, a script should be drafted so that all of the employees would receive the exact same information. The message relayed to Liberty's employees and their Union representatives stated as follows: "All employees are not to report to work on Thursday, September 4th. The business is in transition between Joe Wortley and the Bank. We should know more on the situation tomorrow and will contact you as soon as more information is available." App. A, 4a; App. B, 39a-40a.

In the midst of this turmoil, the Bank was presented with a request and an opportunity to operate Liberty, which, despite its financial difficulties, was very well-poised, having a four-month backlog of work. The company had orders bringing it through the end of the calendar year, and was running three shifts per day, often seven days per week. In fact, Liberty's chief financial officer, Patrick Manderfield, advised the Bank that Liberty's value as an ongoing concern was far greater than its liquidation value and, in the interest of Liberty's employees, wanted the Bank to continue Liberty's operations. At that time, the business was cash neutral positive, so very little support would have been required from the Bank. Moreover, in terms of collateral, the Bank already owned everything that it needed to run the business. App. A, 4a.

The Bank considered this prospect, but the following week, it declined to continue the business, although it subsequently demonstrated a clear ability to do so. For example, in October, 2003, the Bank issued credit memos related to Liberty's former printing operation and it collected on Liberty's accounts receivable. In fact, the Bank hired at least one employee of Liberty to assist in the collection of outstanding receivables. Although Mr. Manderfield was also offered a position by the Bank to assist it with settling the affairs of Liberty, he declined the Bank's offer of employment. Further, and as late as January, 2004, the Bank made payments on monies owed by Liberty. App. A, 4a.

Unhappily, rather than continuing Liberty's operation, the Bank chose to liquidate the company. Since September, 2003, all of Liberty's receivables have been collected by the Bank. During the liquidation process, with the exception of a few items relevant to the fulfillment operation, the Bank auctioned off the hard assets of Liberty, including all of the printing presses. App. A, 4a.

Subsequent to the surrender of its assets to the Bank, Liberty's printing and e-source operation, which represented roughly ninety-eight percent of the company's business, rapidly dissolved. Shortly thereafter, the Heinz Company, which was the largest customer of Liberty's fulfillment operation (but certainly not the biggest customer of the overall business) inquired as to the possibility of preserving its inventory at the Trafford, Pennsylvania facility and resuming fulfillment services there. App. A, 4a.

On September 5, 2003, Joseph Wortley notified Liberty's former management staff, including president Richard Carmody, chief financial officer Patrick Manderfield, plant manager Leonard Manganello, and vice president of sales Ronald Dandrea, that if they felt they could create a viable business compromised solely of warehouse fulfillment services, he would sell it to them for one dollar. Mr. Carmody, Mr. Manderfield, Mr. Manganello, and Mr. Dandrea declined Mr. Wortley's offer. However, they agreed to formulate a business plan for a fulfillment operation. Their plan examined several factors, including anticipated revenue, staffing costs, and rental expenses. App. A, 4a.

The initial business strategy was a cash-neutral plan, which was developed to demonstrate the new business roughly breaking even. Later, Barbara Wortley, Joseph Wortley's wife, agreed to back the endeavor with an initial equity investment of $25,000. Mrs. Wortley later extended a loan to Trafford in the amount $17,000. She made no further investments in or loans to the business. The new venture also established an independent financing arrangement with Irwin Bank & Trust based on

accounts receivable. Trafford's articles of incorporation were executed on September 23, 2003. App. B, 41a.

At its inception, Trafford was in need of certain equipment, including fixtures, furniture, and appliances, to operate its fulfillment business. Trafford engaged Graphtek, Inc., a qualified appraiser, to perform a valuation of certain items then owned by the Bank but still located at the former Liberty site in Trafford, Pennsylvania. These items were necessary to Trafford's fulfillment operation. The fair liquidation value of these items, which included rack shelving, hand trucks, cabinets, office chairs, desks, pictures, and computer equipment, was listed by Graphtek, Inc. as $23,162.00. In October, 2003, the Bank agreed to sell the listed equipment to Trafford for $27,000, which was considered by both Trafford and the Bank to be a commercially reasonable value. In May, 2004, a bill of sale for the asset purchase of the listed equipment from the Bank was executed by Trafford. App. A, 4a-5a; App. B, 41a.

Shortly following Trafford's creation, the Unions filed charges against Liberty and Trafford alleging violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. The Unions claimed that Trafford was obligated to abide by the terms of Liberty's labor agreements. To date, no unfair labor charges have been filed against the Bank. App. B, 45a-46a.

At the time of the ALJ hearing, Trafford had only twelve employees, with ten individuals employed on a full-time basis, and two working a part-time schedule. Approximately one-half of Trafford's staff is compromised of warehouse associates; the remaining employees serve in customer service, computer support, or management positions. App. A, 7a.

At that time, Trafford had only eleven customers. Trafford provides storage and fulfillment services to eight of these eleven customers. The remaining three customers are supplied property rental, rebate program, and bulk storage services from Trafford. These new lines of business were never offered by Liberty. App. A, 7a.

As of December 31, 2003, Trafford's total accounts receivable totaled only $231,933.51. Including accounts receivable, the company's total assets amounted to $278,437.43. As of April 30, 2004, Trafford's total accounts receivable totaled $239,270.88, and its total assets amounted to $304,723.75. Trafford pays a monthly rental fee on the Trafford, Pennsylvania facility. For December, 2003, this rental payment totaled $12,000. In April, 2004, a rental payment of $10,500 was made. App. B, 41a.

On July 19 and 20, 2004, this matter was heard before administrative law judge ("ALJ") Paul Bogas. On November 24, 2004, ALJ Bogas issued a decision and recommended order finding that Trafford and Liberty are alter egos and, as such, that Trafford is bound by Liberty's collective bargaining agreements with the Unions. Based upon Trafford's failure to comply with the terms of Liberty's labor contracts, the ALJ found that Trafford violated Sections 8(a)(1) and 8(a)(5) of the Act. App. B, 55a.

Trafford, stating that the ALJ's decision was contrary to law and the evidence of record, filed exceptions and a supporting brief with the National Labor Relations Board ("Board") on December 20, 2004. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief on January 11, 2005. By decision and order dated July 22, 2005, the Board affirmed the ALJ's rulings, findings, and conclusions and adopted the recommended order of the ALJ directing Trafford to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. App. B, 20a.

Trafford filed a timely petition for review in the United States Court of Appeal for the Third Circuit, arguing that the decision by the Board lacked substantial evidence and contained an error of law with regard to the application of the alter ego test. By decision dated February 26, 2007, the Third Circuit affirmed the decision of the Board. App. A, 3a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted for three reasons. First, the threshold question of law in this case, *i.e.*, whether the Board, when it seeks to apply the alter ego doctrine, must find that the change in ownership was motivated by an intent to avoid obligations under the National Labor Relations Act, is unsettled. In the absence of clear guidance from this Court, the courts of appeals have developed three distinct approaches to the question and role of intent in alter ego cases. This case presents the Court with an opportunity to resolve the split of authority in the courts of appeals.

Second, certiorari is warranted because the alter ego question is important to the administration and enforcement of the NLRA and should be settled by this Court. In its decision, the court of appeals erroneously discounted employer intent, failing to recognize this factor as an indispensable element of alter ego analysis, and has saddled Trafford with preexisting collective bargaining obligations as well as preexisting terms and conditions of employment. The court's ruling, therefore, stringently and impermissibly impedes the full effectuation of a bona fide entrepreneurial corporate transformation that has provided new and much needed employment opportunities in Trafford, Pennsylvania.

Third, the court of appeal's determinations concerning unlawful motive are unsupported by substantial evidence.

I. The Decision of the Third Circuit Directly Conflicts With Decisions of the Seventh, Eighth, and Ninth Circuits That Require Unlawful Intent as a Prerequisite for the Imposition of Alter Ego Status and Is Also Inconsistent With Decisions of the Fourth Circuit.

The courts of appeals are divided on the proper role of intent in alter ego cases under the NLRA. There are three basic approaches to the question. In conjunction with the Third Circuit, the First, Second, Fifth, Sixth, Tenth, and District of Columbia Circuits agree that intent is relevant

but not essential to an alter ego finding. *See, e.g., Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998); *Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984) (per curiam); *Carpenters, Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986); *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984) (per curiam).

The Seventh, Eighth, and Ninth Circuits have concluded that unlawful employer intent must be present before alter ego status may be imposed. *See, e.g., Trustees of Pension Funds of Local 701 v. Favia Electric Co.*, 995 F.2d 785, 789 (7th Cir. 1993) ("unlawful motive or intent are [sic] necessary for the application of the alter ego doctrine"); *Operating Eng'rs v. Centor Contractors*, 831 F.2d 1309, 1312 (7th Cir. 1987) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis"); *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 237-38 (8th Cir. 1986) (emphasizing "critical motivational aspects" of the court's alter ego analysis); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir.) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis" and finding that one employer "may have been formed specifically to avoid the labor law obligations" of the other, a "consideration that is at the heart of the alter ego inquiry"), *cert. denied*, 469 U.S. 1088 (1984); *Local 343, Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1994 U.S. App. LEXIS 39559 *7 (9th Cir. 1994) ("[t]o prevail on the 'alter ego' theory, appellees were required ... to prove that North Bay was being used 'in a sham effort to avoid collective bargaining obligations' ... rather than for the pursuit of legitimate business objectives untainted by 'union animus'") (citations omitted); *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 519 (9th Cir. 1989) ("[i]n all alter ego determinations an element of fraud or

misrepresentation also exists").[1]

The Fourth Circuit has taken yet a third approach to the question, adopting a "reasonably foreseeable benefit" standard that analyzes "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." *See, e.g., Alkire v. NLRB,* 716 F.2d 1014, 1020 (4th Cir. 1993).

Commentators who have discussed this issue are also divided. *Compare* Frederick Slicker, *A Reconsideration of the Doctrine of Employer Successorship-A Step Toward a Rational Approach,* 57 Minn.L.Rev. 1051, 1064 (1973) (arguing for an intent based standard); Comment, *Bargaining Obligations After Corporate Transformations,* 54 N.Y.U.L.Rev. 624, 638 (1979) (same) *with* Stephen Befort, *Labor Law and the Double Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation,* 67 Wisc.L.Rev. 67, 101 (1987) (arguing against requiring intent); Gary MacDonald, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations,* 86 Mich.L.Rev. 1024, 1056 (1988) (same).

A close look at the consideration of intent by the ALJ, the Board, and the Third Circuit in this case illustrates and accentuates the confusion and uncertainty that presently exist concerning the role of intent in alter ego cases. The ALJ expressly stated that "[a] showing of improper motive is not necessary to a finding of alter ego status." App. B, 51a. Still, his alter ego finding — which the Board affirmed without extended explanation — was predicated on his analysis that Trafford was created as a device to evade responsibilities under the Act. In

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[1] The position of the Eleventh Circuit is not clear. *See generally Road Sprinkler Fitters, Local 669 v. Independent Sprinkler Corp.,* 10 F.3d 1563, 1568 &n.4 (11th Cir.), *cert. denied,* 115 S. Ct. 189 (1994); *ILA, Local 1988 v. Pate Stevedore Co.,* 145 LRRM (BNA) 2275, 2278-79 & n.4 (N.D. Fla. 1993), *aff'd without opinion,* 41 F.3d 668 (11th Cir. 1994).

affirming the ALJ's finding that the purpose behind the creation of Trafford was to avoid legal obligations under the Act, Chairman Battista adhered to his position that the General Counsel must show, *inter alia*, an intent to avoid legal obligations under the Act in order to prove alter ego status; however, the Chairman nonetheless concurred with his colleagues in the finding of alter ego status. App. B, 28a. In affirming the Board's determination, the court of appeals adopted the ALJ's position that a showing of unlawful intent is not a prerequisite to a finding of alter ego status. App. A, 8a.

Prior to its decision in this case, the Third Circuit had noted that the "[a]pplication of the National Labor Relations Act to cases involving a reorganization of an employer has proven to be vexing" and that the issue of the role of intent in alter ego cases "has yielded no consensus among the courts of appeals that have considered it." *Stardyne, Inc. v. NLRB,* 41 F.3d at 146. The uncertainty enunciated by the Third Circuit epitomizes the uncertainty that is prevalent because of the conflict in the courts of appeals. This Court should grant the petition to review this division and to eliminate this confusion.

II. Whether Unlawful Intent Is Required as an Element of Alter Ego Status Presents an Important Question of Federal Labor Law That Has Not Been, but Should Be, Settled by This Court.

The alter ego issue in this petition involves fundamental considerations of national labor policy. This Court has stated that "the fundamental premise" of the NLRA is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB,* 397 U.S. 99, 108 (1970). This has been the Act's fundamental premise from its inception. "The theory of the [A]ct is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the [A]ct in itself does not attempt to compel." *NLRB v. Jones & Laughlin*

Steel Corp., 301 U.S. 1, 45 (1937); *see* 29 U.S.C. § 158(d) (Act "does not compel either party to agree to a proposal or to require the making of a concession").

This Court has also recognized that employers must have the flexibility and ability to reorganize and transform their business. The Court has stated, for example, that "an employer has the absolute right to terminate his entire business for any reason." *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965). In an analogous context, the Court has concluded "that the harm likely to be done to an employer's need ... to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision...." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981).[2]

In juxtaposition to this backdrop of legitimate employer interests and rights in the alter ego context are employee interests and expectations in maintaining their union's collective bargaining relationship. This Court has grappled with this tension in national labor policy in related contexts. *See, e.g., NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972) (elucidating scope of the "successorship" doctrine that normally obligates the successor to recognize and bargain with the union but not to adhere to the predecessor's contractual obligations); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551-52 (1964). The Court should act now to resolve this underlying tension in alter ego cases.

The Court has materially discussed the alter ego doctrine under the NLRA on only two previous occasions. The Court solidified the foundation of the doctrine in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). The relevant test was described in general terms:

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[2] In *First National Maintenance*, the Court held that "an economically motivated decision to shut down part of a business" is "*not* part of § 8(d)'s 'terms and conditions' ... over which Congress has mandated bargaining." 452 U.S. at 680, 686 (emphasis in the original).

"[w]hether there was a bona fide discontinuance and a true change of ownership ... or merely a disguised continuance of the old employer." *Id.* at 106. The *Southport* decision, however, did not resolve whether unlawful intent to avoid labor obligations was a necessary predicate of the doctrine.

In *Southport Petroleum,* the Court was faced with a company that had violated the prohibition in Section 8(a)(3) of the Act forbidding discriminatory discharges on the basis of union activity. *See* 315 U.S. at 101-02. After stipulating that it would obey the NLRB's order, the company, three days later, distributed all of its assets to four stockholders who, in turn, conveyed these assets to a newly organized company. *Id.* at 102-03. The stockholders claimed that, in view of the dissolution of the predecessor company, the Board's remedial order had no effect. *Id.* The only issue before the Court was whether the court of appeals had erroneously denied the organized company the right to introduce evidence concerning the dissolution of the predecessor company. *Id.* at 104. The Court affirmed that the Board's order was appropriately directed to the newly organized company. *Id.* at 106. There was clear unlawful intent in the blatant attempt to avoid the Board order in *Southport Petroleum,* and the Court did not rule — and had no need to rule — on the intent question presented in this petition. *Southport Petroleum* did not even involve a potential violation of Section 8(a)(5) and adherence to contractual obligations — the central issue before the Court in this petition.

The Supreme Court's other treatment of the alter ego doctrine occurred in *Howard Johnson Co. v. Hotel Employees,* 417 U.S. at 259 n.5. The Court's discussion of the alter ego doctrine occurred *en passant;* the Court's holding concerned the "successorship" doctrine and the principle that, unless there is substantial continuity of the workforce, an asset purchaser was not bound by an agreement to arbitrate under the seller's collective bargaining agreement. *Id.* at 262-64. Cases such as *Howard Johnson* and *Southport* have served to engender the controversy in the courts of appeals concerning intent and accentuate the need for the Court's careful scrutiny of

the issue.

The proper resolution of the intent question and balancing of relevant policy interests has been succinctly articulated by Chief Judge Sloviter of the Third Circuit, who provides the appropriate analytical framework for resolution of this case. When a company is formed for antiunion reasons or to avoid outstanding labor law obligations:

> it is necessary to overlook the corporate technicalities in order to prevent subversion of the NLRA process and frustration of national labor policy. On the other hand, in the absence of evidence of such an unlawful motive, the courts have effectuated the countervailing policy that employers can use their business judgment....

NLRB v. Scott Printing Corp., 612 F.2d 783, 791 (3d Cir. 1979) (Sloviter, C.J., dissenting). Otherwise, a potential employer — even an employer that may share a substantial identity with a predecessor employer — may be unwilling to put time, money, and resources into saving "a moribund business." And saving that business may entail "changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." *NLRB v. Burns International Security Services, Inc.*, 406 U.S. at 287-88.

There can be no question in this case but that Liberty was "a moribund business." Liberty's demise and Trafford's subsequent creation was not designed to avoid Liberty's collective bargaining obligations with the unions; it had nothing to do with the unions. Liberty's closure was the inevitable and unfortunate result of the deteriorating financial relationship between Mr. Wortley and the Bank, which culminated in the Bank's filing of a $1.8 million complaint in mortgage foreclosure against Liberty. As the ALJ properly recognized, "it implausible that J. Wortley would sacrifice the printing and e-source operations that constituted over 90 percent of Liberty's business for the purpose of freeing the warehouse/

fulfillment operation from its labor law responsibilities ... that would not be the tail wagging the dog, but the "tip of the tail" wagging the dog." App. B, 51a. Likewise, Trafford's ensuing formation and operation was simply an attempt to start and maintain a small, legitimate business. Under these circumstances, the alter ego doctrine — an equitable doctrine[3] — should not be applied as a matter of federal labor law to inhibit a company whose purpose is not to evade preexisting collective bargaining obligations. The Court should review this legal question of great practical importance in federal labor law and rectify this unfair result.[4]

III. Certiorari is Warranted Because the Determinations of the ALJ, as Affirmed by the Board and the Third Circuit, were Unsupported by Substantial Evidence.

The substantial evidence test applies when agency action occurs in connection with an adjudicatory hearing, *see* 5 U.S.C. §§ 556 and 557, which was precisely the type of hearing held in this case. In *Morgan v. United States*, 298 U.S. 468, 480 (1936), this Court explained that such a hearing "has a quality resembling that of a judicial proceeding" and that such proceedings are frequently described as possessing "a quasijudicial character." Continuing, the *Morgan* Court held that an adjudicatory hearing under 5 U.S.C. §§ 556 and 557 "is the hearing of

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[3] Distilled to its essence, the alter ego doctrine centers around the disregard of corporate form. This Court has stated that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). The alter ego doctrine has been fashioned to ensure that corporate form does not override the federal legislative policies set forth in the NLRA. It is particularly appropriate for this Court to decide when federal labor law policies requiring adherence to contractual obligations supersede adherence to corporate form.

[4] *See generally* Note, 86 Mich. L. Rev. at 1027 n.14 (discussing increasing "activity ... and importance" of alter ego cases).

evidence and argument" and that if the hearing officer "who determined the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-81.

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), this Court stated in no uncertain terms that "substantial evidence" under the APA requires a thorough review of the entire record.[5] According to the *Universal Camera* Court's analysis, the Administrative Procedure Act definitively bars the practice of ignoring "contradictory evidence or evidence from which conflicting inferences could be drawn...." 340 U.S. at 487. Continuing, the *Universal Camera* Court held that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in [the APA] that the court consider the whole record." 340 U.S. at 488. The APA's own legislative history, which reinforces *Universal Camera* Court's analysis, indicates that the APA's "requirement of review upon the whole record" means that an agency fact-finder "may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

Pursuant to the holdings in *Morgan* and *Universal Camera*, and the APA's own legislative history, the ALJ was required to consider "the whole record" before ruling on the question of Trafford's alter ego status. It is apparent in this case that the ALJ failed to consider "the whole record" before rendering his ruling on Trafford's status. In considering the role of intent, the ALJ stated that "[t]here is little in the record to show that the decision to cease operating as Liberty and continue the warehouse/ fulfillment operation in the form of a new entity, was done for legitimate reasons." In fact, the

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[5] The standard of proof specifically required of National Labor Relations Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act. 340 U.S. at 487.

evidence clearly shows that the demise of Liberty and subsequent creation of Trafford constituted a bona fide discontinuance and a true change of ownership. Nothing in the record is inconsistent with the conclusion that Trafford was established in a legitimate attempt to offer services, some of which had previously been provided by another company. Trafford was not created as a disguise. It was not formed to evade any labor obligations. Trafford's formation and operation was simply an attempt to start and maintain a small, legitimate business.

The ALJ failed to consider evidence establishing that there was never any preconceived plan to create Trafford at all, including Trafford's plant manager Leonard Manganello's testimony that "[w]e were taking one day at a time. I had no assurance that this was going to work. I, myself, was there on a day to day basis. I wasn't sure if I was going to get a paycheck. We just took it one day at a time...." App B, 51a-53a.

Evidence demonstrating that Trafford gave no consideration whatsoever to any individual's status as being represented by either of the Unions in selecting the individuals who would ultimately compromise its new workforce was also disregarded by the ALJ. In recruiting employees to work for Trafford, Mr. Manganello testified that he sought out individuals who: 1) had the ability to multi-task; (2) demonstrated flexibility; (3) had a basic understanding of warehouse duties; (4) had the necessary computer skills; and (5) had experience interacting with customers, who would often visit the worksite. The evidence established that Trafford was simply looking for the "best people" to help it get its new operation off the ground. App B, 51a-53a.

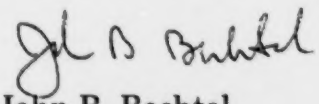
Finally, but perhaps most significantly, the ALJ ignored the fact that Liberty was irrefutably in default at the time that it ceased operations and turned over its assets to the Bank. Such evidence obviously weighs heavily in favor of the conclusion that the cessation of Liberty's operations was motivated not by a desire to avoid its labor law obligations, but rather by legitimate business reasons. App B, 51a-53a.

According to the *Morgan* Court, the weight ascribed by the law to ALJ's determinations herein "rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify." 298 U.S. at 481. As such, the ALJ's determination that a desire to avoid labor law obligations was a motivation for Trafford's creation was unsupported by substantial evidence. Accordingly, this Court's immediate intervention is required.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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